



POLICE DEPARTMENT CITY OF NEW YORK

October 17, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Francis Conejo
Tax Registry No. 954664
46 Precinct
Disciplinary Case No. 2015-12928

Charge and Specification:

1. Said Police Officer Francis Conejo, on or about August 17, 2014, at approximately 2100 hours, while assigned to Patrol Borough Bronx, and on duty, in the vicinity of Ryder¹ Avenue and Field Place, Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department in that he damaged the property of Person A.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT-PROHIBITED
CONDUCT

Appearances:

For CCRB/APU: Cindy Horowitz, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, New York 10038

Hearing Date:

July 18, 2016

Decision:

Respondent is found Not Guilty

Trial Commissioner:

ADC'T Robert W. Vinal

¹ The proper spelling is Ryer, not Ryder. [See CCRB Exhibits (Ex.) 1, 2 and 4]

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 18, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Civilian Complaint Review Board (CCRB) Administrative Prosecutor offered the out-of-court statements of Person A and Person B. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It is not disputed that on August 17, 2014, Respondent was on duty, in uniform, performing foot patrol alone when he observed Person A's car parked in front of a fire hydrant on Ryer Avenue, a one-way street in the Bronx. As Respondent began writing a summons, Person A returned to his car, opened the driver's side door, got into the driver's seat and started the engine. Person A then put the car into reverse and backed the car up. He then shifted the car into drive and drove the car forward. Respondent struck the front passenger's window of Person A's car with his asp causing damage to the window. (CCRB Ex. 3B)

At Person A's recorded interview by CCRB investigators, which was conducted on August 26, 2014, he stated that when he got into the driver's seat, Respondent said, "Don't even try it." Person A responded, "All right." Person A then put the car into reverse and started to move the car backwards in order to move away from the fire hydrant. Respondent then slapped the driver's side of the windshield with his open hand. The loud sound of the slap scared Person A braked, "put the car in drive," and "maneuver(ed) out (of) the parking spot." (CCRB Ex. 1, p.

After Person A put the car in drive to maneuver out of the parking spot, Respondent struck the front passenger window of the car with his asp which broke the glass, (CCRB Ex. 1, p. 18) Person A then "peeled off" and drove forward down the road, (CCRB Ex. 1, p. 19) Person A drove a few blocks and then called the 46 Precinct to file a complaint against Respondent. Shortly thereafter, Person A was arrested and charged with the felony crime of Reckless Endangerment. (CCRB Ex. 4 p. 1) His car was vouchered as evidence. (CCRB Ex. 4) When Person A appeared in Criminal Court, he pleaded guilty to having committed the Class B misdemeanor of attempting to unlawfully flee a police officer in a motor vehicle.²

At Person B's recorded interview by CCRB investigators, which was also conducted on August 26, 2014, he stated that he and his friend Person A were standing next to the car near the fire hydrant talking when they saw Respondent approaching the car, and that he and Person A then re-entered the car. Person B sat down in the front passenger seat. Person B stated that Person A "got in his vehicle to, to leave so he wouldn't get the ticket." (CCRB Ex. 2, p. 3) and that Respondent then slapped the driver's side windshield with his open hand. When Person A then put the car into reverse "to leave" and backed the car up about eight feet (CCRB Ex. 2, p. 12), Respondent withdrew his night stick, ran up to the car and hit the front passenger side window, shattering the glass, some shards of which hit Person B's knee resulting in a cut on his left knee. (CCRB Ex. 2, p. 12 15)

Respondent testified that when he began writing out a summons for parking in front of a fire hydrant, he was standing in the street next to the driver's side front windshield so that he could read and write down the information on the vehicle's registration sticker. As he was

² Unlawfully fleeing a police officer in a motor vehicle is a Class A misdemeanor. Penal Law Section 270.25.

writing the summons, Person A approached him from behind and asked what he was doing. When Respondent explained that he was writing a summons, Person A entered the driver's seat and turned the ignition on. When he heard the ignition start, Respondent put his summons book back in his pocket. Person A said, "Don't give me a ticket." Respondent replied, "I already started writing it."

Person A then put the car in reverse, causing Respondent to jump into the middle of the narrow, one-way street. Person A backed his car up about ten feet and then stopped the car. Respondent, who had moved to a position in front of the passenger side of [REDACTED]'s car, then heard "burning rubber driving towards" him which caused him to fear for his safety. He removed his asp in the hope that Person A would see him holding the asp and bring the car to a stop. Instead, Person A drove the car rapidly toward him. Respondent had to jump out of the way to avoid being struck by the car. Respondent swung his asp at the vehicle. It struck and broke the front passenger side window. After Person A drove away, Respondent went to the 46 Precinct to file a complaint against Person A.

Analysis

It is not disputed that Respondent swung his asp at Person A's car and that the asp hit and damaged the passenger side window of the car. However, the charge brought by CCRB against Respondent here presents an unusual situation in that although Respondent admittedly used force, he is not charged with having violated any Patrol Guide procedure regulating the use of force. Rather, he is charged with engaging in conduct prejudicial to the good order, efficiency or discipline of the Department based on the result of his use of force: the damage his asp caused to Person A's car.

Respondent testified at this trial that he had swung his asp at Person A's car in self-defense as Person A drove the car rapidly toward him as Person A was fleeing the scene and that it was only

because he had jumped out of the way that he was able to avoid being struck by the car. Based on Respondent's description of when and why he swung his asp, his use of this non-lethal force falls within the New York Penal Law's Defense of Justification³ which permits a police officer to "use physical force when and to the extent he reasonably believes such to be necessary to . . . defend himself. . . . from what he reasonably believes to be the use . . . of physical force."

Person A's and Person B's statements to CCRB were offered as hearsay evidence at this trial. Although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,⁴ even where hearsay testimony is supported by circumstantial evidence it may be insufficient to support a finding of guilt in a disciplinary trial that involves a close question of credibility.⁵ The determination of the instant charge involves a close question of credibility.

In evaluating the believability of Person A's and Person B's statements, it must be noted that the interviews of these two friends were conducted nine days after this incident. Since neither appeared to testify at this trial, Respondent's attorney did not have the opportunity to cross-examine either of them about the closeness of their friendship or about whether, and how often, they had discussed and compared their versions of this incident, and he did not have the opportunity to cross-examine Person B about whether he had lied at CCRB to support his friend's account since his friend was facing a felony charge regarding this incident.

In addition, in evaluating the credibility of Person A, I find it significant that he pleaded guilty in Criminal Court to the crime of attempting to unlawfully flee a police officer in a motor

³ Penal Law section 35.30 (1) "Justification; use of physical force in making an arrest or in preventing an escape."

⁴ RCNY Title 38, 15-04 (e) (1).

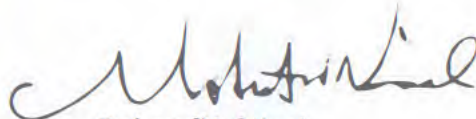
⁵ *Eppler v. Van Alstyne*, 93 AD2d 930, 462 NYS2d 320, 1983 NY App Div LEXIS 17824.

vehicle in the third degree. For the purposes of this proceeding, this conviction establishes that, while Respondent was attempting to lawfully serve Person A with a summons, Person A committed a crime in that he attempted to flee the scene by driving away.

Finally, at the time [REDACTED] made his statement to CCRB, a felony charge of Reckless Endangerment, brought by Respondent, was pending against him. Since Person A did not appear to testify at this trial, Respondent's attorney did not have the opportunity to cross-examine him regarding whether his description of how he had "maneuvered" his car away from his parking spot next to the fire hydrant was effected by his knowledge that he was facing a felony charge that he had driven recklessly and had thereby endangered Respondent.

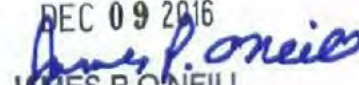
Based on the above analysis, I find that the hearsay statements of Person A and his friend Person B constitute insufficient credible evidence to meet the Administrative Prosecutor's burden of proof. Therefore, it is recommended that Respondent be found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner Trials

APPROVED

DEC 09 2016

JAMES P. O'NEILL
POLICE COMMISSIONER